No. 3001

IN THE

United States Circuit Court of Appeals

FOR THE

Ninth Circuit

RALPH H. CAMERON, NILES J. CAMERON, B. A. CAMERON, S. D. PEPIN, and L. L. FERRALL,

Appellants,

vs.

THE UNITED STATES OF AMERICA,

Appellee.

Brief of Appellee

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA.

THOMAS A. FLYNN,
United States Attorney.

J. O. SETH,
Special Assistant to United States Attorney.

MORTON M. CHENEY,
Assistant to Solicitor, Department of Agriculture.

No. 3001

IN THE

United States Circuit Court of Appeals

FOR THE

Ninth Circuit

RALPH H. CAMERON, NILES J. CAMERON, B. A. CAMERON, S. P. PEPIN, and L. L. FERRALL,

Appellants,

vs.

THE UNITED STATES OF AMERICA,

Appellee.

BRIEF OF APPELLEE

STATEMENT OF CASE.

The appellants' statement of facts is in the main a correct narrative, but it is deemed advisable, in order that the issues may be truly presented to supplement it, as follows:

When on May 17, 1905, the appellant, Ralph H. Cameron, filed his application for patent on the Cape Horn Lode mining claim, involved herein, with the Register and Receiver of the United States Land Office at Prescott, and after protest against said application was made and hearing had, at which said Ralph H. Cameron appeared and introduced evidence in support of said mining claim on location and in support of his application for patent, the Secretary

of the Interior, it should be stated, **gave full consideration to the evidence taken at the aforesaid hearing,** and thereupon held on February 11, 1909, as stated by the appellants that no discovery of mineral had been made within the boundaries of said alleged Cape Horn Lode mining claim, and that the land embraced in the said Cape Horn Lode mining claim was not mineral in character, and the said Secretary of the Interior rejected the said application for patent and held the location of the Cape Horn Lode mining claim to be null and void, and held the lands therein embraced to be a part and parcel of the Grand Canyon National Monument.

On September 19, 1913, the said Ralph H. Cameron was, under authority vested in the Secretary of Agriculture, by the act of June 4, 1897, (30 Stat. 1911) formally offered a free special use permit, authorizing the occupancy of that part of the said land to the plaintiff on which the buildings maintained by the said defendants on the said alleged Cape Horn Lode mining claim are located, and said permit was **specifically offered subject to the rules and regulations prescribed by the Secretary of Agriculture for the occupancy of National forests,** which said permit was, as stated by the appellants, declined by the said Ralph H. Cameron.

The statement on Page 14, brief of the appellants, that the evidence before the Secretary of the Interior in the hearing held at the protest against the

issuance of patent, pursuant to the aforesaid application for patent, filed by said Ralph H. Cameron:

> "Overwhelmingly proved that there had been sufficient discovery of mineral bearing rock in place, on said grounds, prior to said location, and at numerous dates thereafter prior to the establishment of said National Manument, to sustain the validity of the said location"

is not supported by the answer, and the Secretary of the Interior, after full consideration of the evidence, did actually find on the evidence submitted that no discovery had been made sufficient to sustain the validity or existence of the said location.

While the appellant, R. H. Cameron, denies that, at the said hearing, on which the cancellation of the location was based "he ever introduced any evidence to sustain his location for mining claims," (appellants' brief, page 2) evidence on this point and going directly into the character of the land, and the fact of discovery, was so submitted by him, as shown by the appellee's Exhibit "D," which is a certified copy of the decision of the Secretary of the Interior, dated February 11, 1909, (Page 139, T of R.), and said decision states (Page 139, T. of R.), that the character of the land, applicant's good faith and his compliance with the law, each were fully gone into by both parties in their evidence, and the testimony as reviewed and restated by the Secretary in his decision shows that the facts needed by the Depart-

ment to properly determine the validity of a mineral location were in fact submitted.

The statement on page 14 of the brief of the appellants that the Secretary in said decision

> "Made no finding of fact, which was a lawful reason to hold a mining claim or location null and void"

is controverted, since Exhibit "D" of the appellee, previously referred to, shows that definite findings of fact were made by the Secretary of the Interior, and the question whether the reasons were lawful, is a matter of law and not of fact.

THE DEPARTMENT OF THE INTERIOR HAS JURISDICTION TO DETERMINE THE VALIDITY OF A MINERAL LOCATION, AND ON EVIDENCE SUBMITTED, TO CANCEL AND DECLARE NULL AND VOID ANY LOCATION NOT MEETING THE REQUIREMENTS OF THE LAW.

In pursuance of authority expressly granted by Article 4, Section 3 of the Constitution, Congress has created the Land Department a quasi-judicial tribunal and vested it with authority to hear and determine claims to the public lands asserted under acts of Congress. U. S. Revised Statutes, Secs. 441, 453, and 2478.

> **Sec. 441.** The Secretary of the Interior is charged with the supervision of public business relating to the following subjects:

* * * Second. The public lands, including mines.

Sec. 453. The Commissioner of the General Land Office shall perform, under the direction of the Secretary of the Interior, all executive duties appertaining to the surveying and sale of the public lands of the United States, or in any wise respecting such public lands and also, such as relate to private claims of land, and the issuing of patents for all grants of land under the authority of the Government.

Sec. 2478. The Commissioner of the General Land Office, under the direction of the Secretary of the Interior, is authorized to enforce and carry into execution by appropriate regulations, every part of the provisions of this Title (Title XXXII, The Public Lands) not otherwise especially provided for.

These statutes vest in the officers of the Land Department, the Secretary of the Interior and the Commissioner of the General Land Office, complete and absolute supervision, control, administration and authority over all public lands of the United States in every respect not otherwise specifically provided by law. In the exercise of these functions the Secretary of the Interior and the Commissioner of the General Land Office act administratively and judicially. The Congress of the United States, in en-

acting these statutes, wisely recognized the need for a competent governmental authority, freed from the restrictions and procedure of ordinary courts of law, possessing administrative powers for the management of the public lands, but at the same time authorized to determine those special questions of law within its peculiar province, and established the Department of the Interior as a special tribunal, which, while resorting to the courts for the execution of its decrees, should pass on all questions of land title arising in connection with the disposition of the public lands, as between the United States and the claimants under its grants. The contention of the appellants that the Secretary of the Interior was without power and authority to determine the validity of a mineral location, denies this quasi-judicial function of the Department of the Interior because it is not in name, as well as in prerogative, a court; it is contended that this is a false conception of the character and duties of the Land Department.

> "Congress has constituted the land department, under the supervision and control of the Secretary of the Interior, a special tribunal with judicial functions, to which is confided the execution of the laws which regulate the purchase, selling and care and disposition of the public lands." Riverside Oil Company v. Hitchcock, 190 U. S., 316, 324, 47 L. Ed., 1074, 1078.

> "The land department of the United

States is a quasi-judicial tribunal, invested with authority to hear and determine claims to the public lands subject to its disposition, . . . "James et al. v. Germania Iron Co., 107 Fed., 597, 600.

"The phrase 'under the direction of the Secretary of the Interior,' as used in these sections of the statutes is not meaningless, but was intended as an expression in general terms of the power of the Secretary to supervise and control the extensive operations of the Land Department of which he is the head. It means that in the important matters relating to the sale and disposition of the public domain, the surveying of private land claims and the issuing of patents thereon, and the administration of the trusts devolving upon the government, by reason of the laws of Congress or under treaty stipulations, respecting the public domain, the Secretary of the Interior is the supervising agent of the government to do justice to all claimants and preserve the rights of the people of the United States." Knight v. Land Association, 142 U. S. 161, 177; 35 L. Ed. 974, 980.

Under this delegation of authority, vested in the Interior Department, and recognized by the courts in the cases cited, the Land Department finds complete jurisdiction over claims to the public lands in

the absence of some specific provision to the contrary.

Warnekros v. Cowan, 13 Ariz. 42, 108 Pac. 238;

Cosmos Co. v. Gray Eagle Oil Co., 190 U. S., 301, 309;

Bishop of Nesqually v. Gibbon, 158 U. S. 155, 167;

Burke v. S. P. Ry., 234 U. S. 669, 684.

It is submitted that with no statutes cited or available, depriving the Land Department of jurisdiction over mineral locations, the Secretary of the Interior has full power and authority to consider the facts in connection with the application for patent and a claim of mineral location, to reject application for patent and find the location invalid and cancel the location.

It is conceded that where the prerequisites have been met and a valid location of a mining claim is established, two titles exist, and that in addition to the fee simple title resting in the Government, the locator acquires a possessory right, subject, as stated in the brief of the appellants (page 24), to the "power to sell, mortgage, or will" and to use the claim consistent with the purposes for which the location was made. We therefore have no quarrel with the case (Erwin v. Perego 93 Fed. 608) cited on page 26 of the appellants' brief, since it merely holds that the possessory right is fixed after discovery. It by no means follows that the claimant of

a pretended location possesses any or all of these rights and privileges, nor that the Government, as the owner of the fee simple title, is precluded from questioning the validity of the location in a proper procedure. It is only a valid location which carries any right whatsoever. The mineral statutes of the United States prescribe clearly what the prerequisites are to the existence of such a location and the mere attempt on the part of the appellants to obtain this title and right, by monumentation and recording together with the bare allegation on the part of the individual that he has such right does not establish it, unless these prerequisites are met.

It is true that the claimant in a mineral location is not required, by law, to present himself before the officers of the United States and seek an adjudication of his rights, but this operates as no bar to the right of the owner of the land to object to the claim and use of its land. The United States at no time has yielded up its privilege to call in the claimant and require of him a showing as to his compliance with the law, and on failure to show the necessary discovery, to deny the existence of any claim or location and to cancel the pretended right, in which event the claim of title by possession fails.

That the Government, through its Department of the Interior, has such a right, and that the proper proceeding is in that Department, has been generally recognized by the Department itself in its decisions, and firmly established by the decisions of the courts.

It would appear that the counsel for the appellants in their statement at the top of page 34 of the brief

> "that there are no court decisions upon the question which is presented to this Court, and we are not familiar with any Federal law or any rule or regulation of the Land Department even, which can be called to support the Government in its position"

have missed the final decisions of both the courts and of the Land Department, although they have not overlooked decisions tending somewhat to sustain their contentions, and which have subsequently been reversed on final consideration.

In this connection a reference is made to the decision of the First Assistant Secretary of the Interior Vogelsang, in the case Ex Parte Nichols and Smith, (46 L. D. 20), reversing the earlier decision of the Interior Department in the same case.

The decision of Secretary Jones in the same case (unreported) as cited in the appellants' brief, is no longer the recognized law of the Department. On motion for rehearing, Secretary Vogelsang's decision rendered February 6, 1917, re-establishes the prior holdings of the Interior Department (See H. H. Yard et al, 38 L. D. 59), and after reviewing the authorities, definitely holds that:

> "Upon a careful review of this question, and after mature consideration, the Department is convinced that under the law

> and authorities it possesses jurisdiction and authority over the subject matter of the present case,"

and this finding by the Interior Department was made although the question at issue was the right of the Department to cancel the location in proceedings instituted by it, before, and in the absence of, any application for patent.

The case, Cameron v. Lane, decided by Judge Anderson in the Supreme Court of the District of Columbia, and which is relied on by the appellants, was also reversed in the Court of Appeals of the District of Columbia by Associate Justice Charles H. Robb, (45 App. D. C. 404), directing the dismissal of the bill brought by Cameron against the Secretary of the Interior and officers of the Land Department from proceeding to cancel certain pretended mineral locations. Appeal to the Supreme Court of the United States from the decision of Justice Robb was never perfected.

Whatever authority might have been found in the reversed decisions of Secretary Jones and Judge Anderson, it must, as stated, be kept in mind, the cases are distinguishable from that at bar in that no applications for patent had been filed in either case, and Judge Anderson held that had such application been made, thus presenting the case to the Interior Department, it would have had jurisdiction not only to reject the patent, but to go further, and on establishment of lack of discovery to cancel the locations.

This was a direct recognition of the jurisdiction assumed by the Secretary of the Interior in cancelling the Cape Horn mineral location after application for patent. Judge Anderson in his opinion, which was filed March 15, 1916, says:

> "That courts alone have jurisdiction to cancel the location or to determine whether the right thereto does or does not exist, excepting (which is not the case) where a claimant has invoked the jurisdiction of the Department for the purpose of acquiring the ultimate title."

APPLICATION FOR PATENT NECESSARILY SUBMITS LOCATION TO LAND DEPARTMENT

Sec. 2325, U. S. R. S. prescribes the procedure for obtaining a patent on a mineral location and provides that any person or persons

> "having claimed and located a piece of land for such purposes, who has or have complied with the terms of this chapter, may file in the proper land office an application for patent, under oath, showing such compliance."

Rule 41 of the mining regulations of the Interior Department (44 L. D. 296) requires the applicant for patent to make a full showing as to the mineral vein, lode, etc., alleged to exist within the claim.

The statutes and regulations cited require, on

application for patent, a showing of compliance with the requirements of the law, and this carries with it the establishment of a valid location, based primarily on discovery.

Rights under a location could only follow discovery.

Creede and C. C. Mining Co., v. Uintah T. M. and T. Co., 196 U. S. 337.

The question to be determined by the Land Department in passing on any application for mineral patent is the existence of a valid location and the facts which establish one. If there is no location, the department is without authority to issue patent and having assumed jurisdiction to determine the ultimate title, and being required to pass on the validity of the location, it would be nothing less than absurd that the Land Department should have authority on the one hand to pass complete title out of the United States, or on the other to refuse to pass such title, based on the lack of discovery and invalidity of the location and still have no authority to dispose of the claim on which the application for patent was based, leaving the matter at issue in the same status as when submitted to its jurisdiction.

It is well settled that a mineral patent is conclusive, except on direct attack by the United States for fraud; that the issuance of the patent is an adjudication and like a judgment is final as to all matters which the Land Department must determine prior to its issuance, and that among those things which must be so determined, and on which the

patent is conclusive, is the mineral character of the lands embraced in the patent and the fact that a discovery and valid location have been made.

Carson City Gold & Silver Co. v. North Star Mining Co., 83 Fed. 658, 664.

Talbot v. King, 6 Mont., 76, 9 Pac. 434;

Steel v. St. Louis Smelting etc., Co., 106 U. S. 447, 451;

Calhoun Gold Mining Co. v. Ajax Gold Mining Co., 182 U. S. 499, 510;

Creede & C. C. M. & M. Co. v. Uintah T. M. & T. Co., 196 U. S. 337.

If the Land Department in issuing a patent must determine the validity of a location, it must have the same power when it rejects the application for patent. In both cases it must pass on the validity of the location. If it has authority in one case to determine that a discovery has been made, and that the location is valid, no reason appears why it should not have authority when it finds no discovery has been made, to declare the location invalid.

The appellants herein, if they had received a patent, as a result of the findings of the Interior Department, would be entitled to rely on those findings as conclusive. Are they not as well bound by the decisions of the department when the findings were adverse to them and patent was rejected on the ground that their location itself was invalid? It is submitted that an application for mineral patent necessarily submits the whole question of the validity of

the location to the Land Department and that department may, in a proper case, not only reject the application, but declare the location invalid.

In the case of Nome & Sinook Co., v. Townsite of Nome, 34 L. D. 276, involving conflict between a mineral location and a townsite, the Interior Department said:

> "When the protestants here shall apply for patents for their mining claims, should they ever do so, it will be the duty of the Land Department to inquire into and determine any and all questions which may arise under the mining laws generally."

The contention is sustained by the courts in Warnekros v. Cowan, 13 Ariz. 42; 108 Pac. 238, where it is said:

> "Upon the filing of an application for patent to public mineral land, the jurisdiction of the land office becomes exclusive **as to all questions affecting the title to the lands therein applied for,** and so remains until the final determination of the application."

In the case of Cameron v. Bass, 168 Pac. Reporter—advance sheets No. 4., Page 645, the appellant herein, Ralph H. Cameron, sought to enjoin a permittee of the United States Government from occupying a part of the pretended Cape Horn mining location after cancellation of the location by the Interior Department, the lands involved being in part the same as those in the present case, and, injunction

being denied by the Superior Court, the Supreme Court of Arizona recently affirmed the decision, all the judges concurring. The court found that:

> "The mineral character of the land embraced within the Cape Horn lode claim was a matter essential to be determined. In the proceeding before the department that matter was inquired into, evidence pro and con was offered, received, and considered. The question of fact of the mineral character of the claim was determined after a full, fair, and comprehensive trial, and on conflicting evidence the Land Department finally determined the essential fact so under consideration, and for all time and all purposes that determination stands as an unimpeachable record of the actual character of the land at the time the appellant commenced his mineral location, called the Cape Horn, and at all times up to and including the date of appellant's application for patent."

The court cited with approval the decision of the First Assistant Secretary of the Interior, in the case of Nichols and Smith on rehearing, and the authorities there assembled, as to the jurisdiction of the department, and said: "Both the law and authorities sustain the conclusion reached."

Later in their discussion they say:

> "We may concede that the Land Department has no jurisdiction to cancel a mining

location, yet the effect is the same where the Land Department decides that the land embraced within the boundaries of a mining location was as a fact nonmineral in character, and therefore not subject to location under the mining laws. Where such decision becomes final, certainly the claimant can assert no rights dependent thereon, and while the evidences of location are not physically brought before the department and cancelled, the decision is efficient and sufficient to extinguish absolutely and forever, all force and effect said location presumably ever had, and to destroy such location and all evidence thereof for any purpose.

"Any attempt on the part of the claimant to thereafter assert any right based upon said location, so decided invalid, is a collateral attack upon the decision and without effect."

The leading case in the Supreme Court of the United States, Clipper Mining Company, v. Eli Mining and L. Co., (194 U. S. 220) involved a conflict between lode and placer claimants of the same land. Application for patent on the placer locations was rejected by the Interior Deprtment, but the decision did not declare the placer locations void. Shortly thereafter lode locations were made and adverse was filed by the placer claimants against the applicants for patents on the lodes. Even though the Interior Department had not declared the placer locations

void, the lode claimants contended in the case before the Supreme Court that the decision of the Interior Department rejecting the placer application for patent annulled the placer location, and this must we think, have necessitated consideration by the Supreme Court of the authority of the Interior Department to cancel a location.

The court, speaking through Justice Brewer, fully upheld the authority of the Interior Department, saying: (Page 223):

> "So far as the record shows—and the record does not purport to contain all the evidence—the placer location is still recognized in the department as a valid location. Such also was the finding of the court, and being so there is nothing to prevent a subsequent application for a patent and further testimony to show the claimant's right to one. **Undoubtedly** when the department rejected the application for a patent it could have gone further and set aside the placer location, **and it can now, by direct proceedings upon notice, set it aside and restore the land to the public domain.**"

Later in the decision, the court said, (Page 234):

> "The Land Office may yet decide against the validity of the lode locations and deny all claims of the locators thereto. So also it may decide against the placer loca-

> tion and set it aside, and in that event all rights resting upon such location will fall with it."

Even if it be suggested that the language used by the court in that case is dictum, it is certainly entitled to great weight and is practically binding. As to the weight to be given dictum by the Supreme Court, see Daniels v. Wagner 205 Fed. 235, 238 (C. C. A. Ninth Circuit.)

The general proposition maintained by the government is not as stated on page 26 of the appellants' brief, that the grantor may determine the rights of the grantee after a grant, but rather that grant may be denied in the absence of compliance with the conditions precedent to the proposed grant. The donor who gives on condition precedent has the sole right to determine compliance with those conditions in advance of the gift.

THE LAND DEPARTMENT APPLIED THE CORRECT RULE OF DISCOVERY IN ITS DECISION, ANNULLING THE CAPE HORN MINERAL LOCATION.

That there is a different rule of discovery to be applied in determining the validity of a location and in passing on application for patent is recognized.

The rule of discovery followed by the Interior Department in the Cape Horn case was that established by the Land Department and the courts as applicable in determining whether the requirements for a valid location had been met.

Considering first on this point the authorities cited in the appellants' brief, the language quoted on page 30 of the revised brief from Book v. Justice Co. 58 Fed. 106-120 was not intended by Judge Hawley to be literally construed, as evidenced by his decision for the Circuit Court of Appeals, Ninth Circuit, in Migeon et al. v. Montana Central Ry. Co., 77 Fed. 249-255, where he says:

> "The question as to what constitutes a discovery of a vein or lode under the provisions of Sec. 2320 of the Revised Statutes has been decided by many courts. All the authorities cited by appellants are referred to in Book v. Mining Co. 58 Fed. 106,121. The liberal rules therein announced are substantially to the effect that when a locator of a mining claim finds rock in place containing mineral in sufficient quantity to justify him in expending his time and money in prospecting and developing the claim, he has made a discovery within the meaning of the statute whether the rock or earth is rich or poor, whether it assays high or low, with this qualification: That the definition of a lode must always have special reference to the formation and peculiar characteristics of the particular district in which the lode or vein is found. It was never intended that in such a case the courts should weigh scales to determine the value of the mineral found as between a prior and

> subsequent locator of a mining claim on the same lode."

Both cases decided by Judge Hawley, Book v. Justice and Migeon v. Railway Co., involved adverse claims by mineral claimants. It is well established, as stated by Lindley, 3rd Ed, page 765, that:

> "The tendency of the courts is toward marked liberality of construction where a question arises between two miners who have located claims upon the same lode . . . and toward strict rules of interpretation when the miner asserts rights in property which either prima facie belongs to someone else or is claimed under laws other that those providing for the disposition of mineral lands."

The rule laid down in these cases, therefore, is most liberal as to what constitutes a valid location and was applied merely to determine the rights to the presumptive location as between the adverse claimants. The judgment in neither case decided the rights of the parties as against the United States, and left the successful party still to establish the fact of sufficient discovery in order to establish right to possession of the lands of the United States in the event that the right should be questioned. Even so, the liberal rule followed by the court in the Migeon case was followed by the Interior Department in deciding the validity of the Cape Horn loca-

tion. No attempt was made to apply the more strict rule laid down in the other class of cases.

The text book authority, Lindley on Mines, 3rd Ed. is cited in the brief of the appellants, pages 30 to 32. However, the matter quoted is hardly in point since the Cape Horn decision was not based on a requirement that the discovery to validate the location, must, "when worked, yield a profit," nor did it require "ore of a commercial value." It is as to a theory requiring commercial value rather than the holding as to discovery on the Cape Horn location, that the writer concludes results would be unjust, and this conclusion, it will be noted, is not in the words of the author, but is in fact a quotation by him from the decision in Book v. Justice by Judge Hawley, and the effect of that decision has already been stated.

Appellants seemingly contend that the mere finding of mineral, no matter how small the showing, is **alone** sufficient to support a location. This contention is, we think, incorrect. The decisions of the Land Department and of those courts whose views are controlling on a question of Federal law, are completely in accord as to what constitutes a discovery sufficient to support a location.

The leading authority on the question as to what constitutes a discovery of mineral sufficient to support a location is the decision of the Interior Department in Castle v. Womble, 19 L. D. 455, 457, as follows:

"Where minerals have been found and the evidence is of such a character that a person of ordinary prudence would be justified in the further expenditure of his labor and means, with a reasonable prospect of success, in developing a valuable mine, the requirements of the statute have been met. To hold otherwise would tend to make of little avail, if not entirely nugatory, that provision of the law whereby 'all valuable' mineral deposits in lands belonging to the United States * * * are * * * declared to be free and open to exploration and purchase."

The rule is re-stated, perhaps more clearly, in Jefferson-Montana Mines Co., (41 L. D. 320) which was approved by Assistant Secretary Jones in East Tintic Consolidated Mining Co., (43 L. D. 79) as follows:

"After a careful consideration of the statute and the decisions thereunder, it is apparent that the following elements are necessary to constitute a valid discovery upon a lode mining claim:

1. There must be vein or lode of quartz or other rock in place;

2. The quartz or other rock in place must carry gold or some other valuable mineral deposit.

3. The two preceding elements, when

taken together, must be such as to warrant a prudent man in the expenditure of his time and money in the effort to develop a valuable mine.

It is clear that many factors enter into the third element: The size of the vein as far as disclosed, the quality and quantity of mineral it carries; its proximity to working mines and location in an established mining district, the geological conditions, the fact that similar veins in the particular locality have been explored with success, and other like facts, would all be considered by a prudent man in determining whether the vein or lode he has discovered warrants a further expenditure or not."

In Chrisman v. Miller, 197 U. S. 313, the Supreme Court cited with approval the rule laid down in Castle v. Womble, **supra.** This case (Chrisman v. Miller) was a dispute between two placer locations. The court recognized a distinction between controversies between mineral locators, and controversies between a mineral and an agricultural claimant, and held that the rule respecting discovery is more liberal in the first class of cases than in the latter where the land is sought to be taken out of the category of agricultural lands. Recognizing that the case it had under consideration came within the first class where the more liberal rule should be applied, the court nevertheless cited and applied the rule laid down in Castle v. Womble, **supra.** It also held that

mere **willingness** on the part of the locator to further expend his labor and means was not the criterion.

To the same effect is the decision of the Circuit Court of Appeals of the 9th Circuit in Multnomah Min. Co. v. U. S., 211 Fed. 100, where it was held (syllabus):

> "The discovery of mineral, essential to valid mining location on public land, is not satisfied by a finding of traces of gold, but mineral must be found in sufficient quantities to justify a man of ordinary prudence, not necessarily a skilled miner, in the expenditure of his time and money in the development of the property."

Lindley on Mines (3rd Edition) Par. 336, states:

> "The facts which are within the observation of the discoverer, and which induce him to locate, should be such as would justify a man of ordinary prudence, not necessarily a skilled miner, in the expenditure of his time and money in the development of the property."

This quotation from Lindley is approved in Chrisman v. Miller, **supra**: Multnomah Min. Co. v. U. S., **supra**; Steele v. Tanana Mines R. Co., 148 Fed. 678, 680. See also Mason v. Washington-Butte Min. Co., 214 Fed. 32, 35.

> "There must be some gold found within the limits of the land located as a placer gold claim, but it cannot be said in advance as a

> matter of law how much must be found in order to warrant the court or jury in finding that there was in fact a discovery such as the law requires. The question must be decided, not only with reference to the gold actually found within the limits of the claim located, but also in view of its situation with reference to other lands known to contain valuable deposits of placer gold, and whether its rock and soil formation are such as is usually found where these deposits exist in paying quantities; and further, in considering the evidence bearing upon the general question, it must not be forgotten that the object of the law in requiring the discovery to precede location is to insure good faith upon the part of the mineral locator, and to prevent frauds upon the government by persons, 'attempting to acquire patents to land not mineral in its character.' (Shoshone Min. Co. v. Rutter 87 Fed. 801, 31 C. C. A. 223.)'' Lange v. Robinson, 148 Fed. 799, 803.

These authorities show that the rule of discovery, as established by the courts as well as the Land Department, does not require the finding of pay ore, but that something more than the finding of a trace or very small amount of mineral is required —viz., that the surrounding facts and circumstances be such as to justify an ordinarily prudent man in the

further expenditure of his labor and means in the development of the property.

The decision of the Department of the Interior of February 11, 1909, now under discussion, was based principally on the cases of Castle v. Womble and Chrisman v. Miller, **supra**; and it is evident that the Land Department in that decision applied the rule above laid down. It considered the evidence with respect to the finding of mineral within the boundaries of the claim, together with the surrounding circumstances and reached the conclusion that the showing would not justify further development.

But even if the Interior Department had undertaken to apply in the Cameron case a more strict rule as to discovery, as contended by defendant, it would have been clearly justified in doing so.

At the time the Cape Horn claim was located, the land involved was withdrawn for National Forest purposes. The Act of June 4, 1897 (30 Stat. 11, 36) provides with respect to lands within National Forests that

> "any **mineral lands** in any forest reservation **which have been or which may be** shown to be such,**and subject to entry** under the existing mining laws of the United States and the rules and regulations applying thereto, shall continue to be subject to such location and entry, notwithstanding any provision herein contained."

It will be noted that this Act throws open to location only "mineral" lands shown to be such,

and only lands "subject to **entry**" under the mining laws. A mining claim can be initiated in a National Forest only for mineral lands subject to **entry** as distinguished from location. In view of this provision of law the Land Department would be justified in requiring in support of a location, proof of the character of the land sufficient to support an entry for patent. This view is supported by the case of U. S. v. Lavenson, 206 Fed. 755, 763, where the court says:

> 'The following sections of the statute of 1891 show that relative values are involved as much as in the instance recited by the defendants, and further show that discovery alone is not sufficient, and that nothing short of a probably commercially valuable mine will suffice in a forest reserve."

The Court then proceeds to set forth the National Forest Acts above referred to.

Attention is further called to the fact that the decision of the Interior Department now under consideration was not rendered in a controversy between mineral claimants, but in a case where one of the parties alleged the land to be non-mineral in character. In such a case it would seem that the more liberal rule referred to in Chrisman v. Miller, **supra.** as governing controversies between mineral claimants is not applicable; and that the Interior Department would have been justified in holding the mineral claimant to the high degree of proof neces-

sary to take the land out of the category of agricultural lands.

It is submitted, therefore, that even if the appellants could be held to be entitled to raise the question, they are entirely mistaken in their contention that the Department of the Interior erred in applying the law in its decision annulling the Cape Horn location.

THE DECISION OF THE LAND DEPARTMENT THAT THE LAND INVOLVED WAS NON-MINERAL, THAT NO DISCOVERY HAD BEEN MADE, AND ANNULLING THE LOCATION ON THESE GROUNDS, IS CONCLUSIVE ON THE COURTS IN THIS ACTION.

The effect to be given decisions of the Land Department made in proceedings within its jurisdiction, is so well settled by the numerous decisions of the courts both State and Federal, that any extended discussion would seem unnecessary. The following general rules are applicable to decisions of the Land Department where called in question in the courts.

The Land Department of the United States is a quasi judicial tribunal, invested with authority to hear and determine claims to the public lands subject to its disposition, and the decisions of that Department on questions of fact in proceedings within

its jurisdiction are, in the absence of fraud or imposition, conclusive and binding on the courts.

Johnson v. Towsley, 13 Wall, 72, 83, 20 L. Ed. 485.

Lee v. Johnson, 116 U. S. 48, 29 L. Ed. 570.

Shepley v. Cowan, 91 U. S. 330, 23 L. Ed. 424.

DeCambra v. Rogers, 189 U. S. 419, 47 L. Ed. 734.

Heath v. Wallace, 138 U. S. 573, 34 L. Ed. 1063.

Shank v. Holmes (Arizona), 137 Pac. 871.

Old Dominion Copper etc. Co. v. Haverly, 11 Ariz. 241, 90 Pac. 333.

Wormouth v. Gardner (Calif), 58 Pac. 20.

Jeffords v. Hine, 2 Ariz. 162, 11 Pac. 351.

James v. Germania Iron Co., 107 Fed. 597.

McGoldrick Lbr. Co. v. Kensolving, 221 Fed. 819.

> "If there is any one thing respecting the administration of the public lands which must be considered as settled by repeated adjudications of this court, it is that the decision of the Land Department upon mere questions of fact is, in the absence of fraud or deceit, conclusive, and such questions cannot thereafter be relitigated in the courts." Johnson v. Drew, 171 U. S. 93, 99, 43 L. Ed. 88, 91.

On the other hand, if on the uncontradicted facts, or on the facts as found by the Land Department, that Department erroneously applies the law, a court of equity will in a proper proceeding give redress.

Johnson v. Towsley, 13 Wall, 72, 83, 20 L. Ed. 485.

Vance v. Burbank, 101 U. S. 514, 519, 25 L. Ed. 929.

James v. Germania Iron Co., 107 Fed. 597.

It should be observed, however, that it is to the error in applying the law to the facts found or established without dispute **in the hearing before the Land Department**—i. e. to the case as established in that Department—that the rule applies, (Van Patten v. Boyd), (N. M.), 150 Pac. 917, Sanford v. Sanford, 139 U. S. 642; 35 L. Ed. 290); and the mistake in applying the law to such facts must be clear. (Moore v. Robbins, 96 U. S. 530, 535, 24 L. Ed. 848.)

If the decision of the Land Department involves a mixed question of law and fact and the court cannot so separate it as to see clearly where the mistake of law is, the decision of the Department is conclusive.

Marquez v. Frisbie, 101 U. S. 473, 25 L. Ed. 800.

Whitcomb v. White, 214 U. S. 15.

Jeffords v. Hine, 2 Ariz. 162, 11 Pac. 351.

The character of a given tract of land, as mineral, swamp, etc., is a question of fact.

McCormick v. Hayes, 159 U. S. 332, 40 L. Ed 171.

Heath v. Wallace, 138 U. S. 573, 34 L. Ed. 1063.

Earl v. Morrison (Nev.) 154 Pac. 75.

Steel v St. Louis Etc. Co. 106 U. S. 447, 27 L. Ed. 226.

Diamond Coal & Coke Co. v. U. S., 233 U. S. 236, 239.

Burke v. So. Pac. Ry. Co., 234 U. S. 669, 691

> "It has undoubtedly been affirmed over and over again that in the administration of the public land system of the United States questions of fact are for the consideration and judgment of the Land Department, and that its judgment thereon is final. Whether, for instance, a certain tract is swamp land or not, saline land or not, **mineral land or not,** presents a question of fact not resting on record, dependent on oral testimony; and it cannot be doubted that the decision of the Land Department, one way or the other, in reference to these questions is conclusive and not open to relitigation in the courts, except in those cases of fraud, etc., which permit any determination to be re-examined." Burfenning v. Chicago etc. Ry. Co., 163 U. S. 321, 41 L. Ed. 175, 176.

Coming now to the application of these rules to the case at bar: No question of fraud or imposition is involved. The whole matter, so far as this record is concerned, rests on the Decisions of the Department of the Interior (Appellee's Exhibits D, E, and F). An examination of the decision dated February 11, 1909 (Appellee's Exhibit D) discloses that the issue of primary importance before the Depart-

ment was the character of the land embraced in the lode location. Both parties to that proceeding introduced expert testimony and evidence of assays. The decision discusses the situation of the Cape Horn and other claims; the rock formation disclosed; the mineral development (or rather lack of it) in the immediate vicinity of the Cape Horn, and other surrounding circumstances; the expert evidence; the assay returns for the applicant (appellant here), showing some mineral, and those of the protestant showing practically nothing in the way of mineral; and reaches the conclusion that "assay returns such as these, considered in connection with all the circumstances here disclosed, wholly fail to establish the actual mineral character of the lands involved"; and further that no discovery had been made.

This decision was, it is plain, reached after a consideration of conflicting evidence. It was a decision of a question of fact, a determination of the character of the land; and under the decisions above cited it is conclusive. The question involved cannot be relitigated in this action.

It will be noted that the appellants' case stands solely on the same Cape Horn location that was involved in the proceedings before the Interior Department. There is nothing in the record indicating any attempted relocation of the land subsequent to the termination of those proceedings (in fact such a location would have been ineffective within the National Monument).

It having been conclusively determined by the Land Department that the land embraced in this Cape Horn location is non-mineral in character, that there ws no discovery and that such location is invalid, it is submitted that in this Court such location must be regarded as non-existent and as furnishing no basis for appellants' contention.

Appellants, in their brief, apparently attempt to attack the decision of the Land Department, referred to above, on the ground that it applied an erroneous rule as to what constitutes a discovery within the meaning of the mining laws. However, as we have shown above, the primary question decided by the Interior Department was the non-mineral character of the land which is a question of fact. Furthermore, as is pointed out above, the decision was reached after a consideration of conflicting evidence. The assays submitted by the protestant varied widely from those submitted by the applicant for patent. There is no justification for the appellants treating the applicant's evidence in the Interior Department proceeding as true and claiming an erroneous application of the law to the facts such evidence tended to prove. Under the authorities above cited, they must show that the law was erroneously applied to the facts found, or established without dispute, and if the ultimate facts found, or undisputed, are not clearly shown, and cannot be separated from the questions of law, the decision of the Department is conclusive.

Finally, it is clear that the Interior Department

applied the correct rule of discovery in the case at bar.

Section 2325 R. S. U. S., cited on page 35 of the revised brief, merely establishes the prima facie right of a mineral applicant to patent, at the expiration of the sixty-day period fixed, and limits the period for filing an adverse under Sec. 2326 U. S. R. S. by "third parties." It is the duty of the Land Department, before issuing patent to determine that the requirements of the law have been met, and the fact that such adverse claim has not been filed during the period of publication, in no way relieves the department of that duty, nor precludes the exercise of discretion and the right of inquiry into the facts by the Department itself before issuance of the patent.

Section 2325, as cited, is not applicable to this case.

The appellants urge, on page 32, that the provision for submission to the courts of determination of the rights of possession through adverse indicates some intention on the part of Congress to leave, in all cases, the determination of the validity of a mining location to the courts. Consideration of the limited purposes of the technical adverse will show no such intention on the part of Congress. In Warnekros v. Cowan, 13 Ariz. 42, 108 Pac. 238 the court discusses the purpose of this section and holds:

> "The question being open to determination in this territory, we adopt the view that this section creates a statutory exception to

> the exclusive jurisdiction of the land office and that our courts hear and determine suits in aid of an adverse in the exercise of their general jurisdiction."

The statute speaks only of suits between rival mineral claimants and has no application to controversies between parties, (as was the case here) where one alleges the land to be non-mineral in character. The question of validity of a mineral location involves the character of the land and the fact of discovery, neither of which can be determined by the courts under Sec. 2326, and the jurisdiction of the Department on these questions is not affected by it.

Lindley on Mines, 3rd Ed., Par. 765 quoted with approval in Clipper Mining Co., v. Eli Mining Co., 194 U. S. 220, 233. Lefevre v. Amonson 81 Pac. 71, Wright v. Town of Hartville 81 Pac. 649. Doe v. Waterloo Min. Co. (C. C. A. 9th Circuit) 70 Fed. 455, 462.

The case of Perego v. Dodge, 163 U. S. 160, 168, disposes of the matter conclusively:

> "It must be remembered that it is 'the question of the right of possession' which is to be determined by the courts, and that the United States is not a party to the proceedings. The only jurisdiction which the courts have is of a controversy between individual claimants, and it has not been provided that the rights of an applicant for public lands as against the government may

be determined by the courts in a suit against the latter."

The second argument presented in the appellants' brief, that the finding by the Secretary of the Interior that the land is non-mineral in character, and as to the fact of discovery was a conclusion of law and not of fact, has already been disposed of.

The third argument is also met by our earlier discussion, since if the Interior Department had jurisdiction and its findings were conclusive, no error occurred in refusing to admit in evidence the statement of evidence excluded.

The fourth and last contention of the appellants is that the appellants herein are entitled to a decree because of failure of the appellee to make formal and separate reply to the so-called separate defense. The complaint filed in this case and the answer thereto presented all the facts and raise the same issues as are attempted to be separately set up in this part of the answer. Can it be contended that where the pleading and facts at issue are once complete and the issues presented to the court, the defendants can require a re-statement of the complaint merely by presenting the same matter in a separate answer?

In any event, the allegations of the separate defense are deemed denied.

The evidence offered by the appellants having been properly excluded, can no more be used to support the allegations of the separate defense than those of the answer. No evidence, therefore, is be-

fore the court which is properly admissible for consideration under the separate answer.

Wherefore, in view of the foregoing, it is respectfully submitted that the judgment and decree of the United States District Court for the District of Arizona should be affirmed.

THOMAS A. FLYNN,
United States Attorney,

J. O. SETH,
Special Assistant to
United States Attorney,

MORTON M. CHENEY,
Assistant to the Solicitor,
Department of Agriculture,
Solicitors for Appellee.